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Lau Pick Huong v Soh Huang Siah

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HIGH COURT (KUCHING) — CIVIL APPEAL NO KCH-12A-1/1 OF 2014
MAIRIN IDANG JC
2 MAY 2014

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Civil Procedure — Judgments and orders — Setting aside — Irregular judgment — Failure to serve cause papers on defendant's solicitors on record — Failure to serve default judgment on defendant — Whether delay in applying to set aside — Whether good reasons shown for delay — Rules of Court 2012 O 42 r 13

D

Civil Procedure — Service — Post, service by — Service by prepaid registered post — Presumption of good service — Whether rebutted — Post office yet to deliver letter to appellant — Whether there was no proper service

E

Civil Procedure — Writ — Service of writ — Service upon solicitors — Whether plaintiff's solicitors ought to have served cause papers on defendant's solicitors on record — Whether judgment in default rendered irregular for failure to serve cause papers on defendant's solicitors on record

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The writ and statement of claim was served on the appellant/defendant personally. Having failed to enter an appearance, a judgment in default of appearance ('JID') under O 13 of the Rules of Court 2012 ('ROC') was entered against the defendant. The JID was then served on the defendant by prepaid registered post on 6 August 2013. The defendant denied receiving the

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JID. On 12 September 2013 the defendant applied under O 42 r 13 of the ROC to set aside the JID. The learned sessions court judge ('SCJ') dismissed the defendant's application on the basis that the application was out of time by six days from 6 September 2013. The defendant appealed against the SCJ's decision. The defendant contended that the writ and statement of claim had

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not been properly served on her as the documents should have been served on her former lawyers. The defendant claimed that the respondent/plaintiff's lawyers had known of the dispute between the parties much earlier before the filing of the summons and there were letters passing between the defendant former lawyers and the plaintiff lawyers. As such the plaintiff lawyers knew or

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ought to have known that the defendant was represented by the defendant previous lawyers, and therefore all cause papers should have been served on the defendant former lawyers. The defendant argued that since there was no proper of service of the writ and statement of claim, the JID was an irregular judgment and ought to be set aside *ex debitio*. The defendant also asserted that the JID

should also have been served on the defendant's former lawyers for the same reason. An online search showed that the JID was still in the process of being delivered by Pos Malaysia. The defendant asserted there must be actual service of the JID on her to constitute receipt and therefore time for setting aside the JID had not commenced. The defendant also relied on O 1A of the ROC.

Held, allowing the appeal with costs to the plaintiff:

(1) In the exercise of the court's discretion to set aside the JID, the court is entitled to look at all circumstances including the circumstances under which the JID was allowed to be entered as well as the explanation for the delay in making the application and whether the defendant has defence on the merits as shown in the affidavit in support (see para 14).

(2) The plaintiff's lawyers ought to have served the cause papers on the defendant's former lawyers as the plaintiff had known that they were acting for the defendant. The plaintiff lawyers should have communicated with the defendant lawyers on whether they had instruction to accept service of process. Once it is known who the lawyer acting for the opponent is, it is a matter of justice to serve on them. On this ground alone the JID should be set aside. On the same rationale the JID should have been served on the defendant former lawyers (see paras 18 & 22).

(3) The delay of six days in filing her application on the 12 September 2013 to set aside the JID was not intentional as the defendant only came to know of the JID on 15 August 2013. In view of the finding that the plaintiff had known that the defendant was represented by her former lawyers yet the plaintiff's lawyers chose to serve the JID on the defendant personally, the delay was not entirely the defendant's fault (see para 22).

(4) Although s 12 of the Interpretation Acts 1948 and 1967 has a presumption of good service (by prepaid registered post), s 12 also states 'until the contrary is proved'. This means that the presumption is rebuttable. The defendant had made an investigation with Pos Malaysia and their website had revealed that the plaintiff's letter had yet to be delivered to the defendant. The defendant had proven non delivery to her as required by s 12. The letter containing the JID was still at the office of Pos Malaysia (see para 26).

(5) Since the posting was challenged and there was proof that the Post Office had yet to deliver the letter to the appellant, there was no proper service of the JID on the defendant. The defendant had not received the JID as stated in O 42 r 13 of the ROC. The defendant's application was therefore well within time (see para 27).

(6) Even though service of the summons and statement of claims is good in law, a judgment in default of appearance may be set aside if the court is

satisfied that there is a defence on merits. There were clearly triable which would require evidence to be led at the trial (see paras 30 & 40).

(7) The non-compliance with the ROC had not occasioned a substantial miscarriage of justice or occasioned prejudice that could not be cured either by amendment or appropriate order of costs or both (see paras 41–42).

[Bahasa Malaysia summary

Writ dan penyata tuntutan telah disampaikan kepada perayu/defendan secara peribadi. Setelah gagal hadir, satu penghakiman ingkar kehadiran ('PIK') di bawah A 13 Kaedah-kaedah Mahkamah ('KKM') dimasukkan terhadap defendan. PIK tersebut disampaikan kepada defendan melalui pos berdaftar pra-bayar pada 6 Ogos 2013. Defendan menafikan ada menerima PIK tersebut. Pada 12 September 2013, defendan memohon di bawah A 42 k 13 KKM untuk mengenepikan PIK. Hakim mahkamah sesyen ('HMS') menolak permohonan defendan atas alasan bahawa permohonan telah melebihi had masa selama enam hari dari 6 September 2013. Defendan merayu terhadap keputusan HMS. Defendan juga menghujahkan bahawa writ dan penyata tuntutan tidak disampaikan dengan betul kepadanya kerana dokumen-dokumen tersebut sepatutnya disampaikan kepada peguam-peguam defendan. Defendan menghujahkan bahawa peguam-peguam responden/plaintif telah mengetahui mengenai pertikaian antara pihak terlebih dahulu sebelum pemfailan saman dan terdapat surat-menyurat antara peguam-peguam defendan yang terdahulu dengan peguam-peguam plaintif. Dengan itu, peguam-peguam plaintif tahu atau sepatutnya tahu bahawa defendan diwakili oleh peguam-peguam defendan yang terdahulu dan oleh itu kesemua kertas-kertas kausa sepatutnya disampaikan kepada peguam-peguam defendan terdahulu. Defendan menghujahkan bahawa oleh kerana tiada penyampaian writ dan penyata tuntutan yang teratur, PIK adalah penghakiman yang tidak teratur dan sepatutnya diketepikan *ex debition*. Defendan juga menghujahkan bahawa PIK seharusnya disampaikan kepada peguam-peguam defendan yang terdahulu bagi alasan yang sama. Satu carian secara talian menunjukkan bahawa PIK masih dalam proses dihantar oleh Pos Malaysia. Defendan menegaskan bahawa mestilah terdapat penyampaian sebenar PIK di pihaknya untuk menunjukkan penerimaan dan oleh itu masa bagi pengenepian PIK belum bermula. Defendan juga bergantung kepada A 1A KKM.

Diputuskan, membenarkan rayuan dengan kos kepada plaintif:

(1) Dalam menjalankan bidang kuasa mahkamah untuk mengenepikan PIK, mahkamah berhak untuk merujuk pada hal-hal keadaan termasuklah hal-hal keadaan di mana PIK dibenarkan untuk dimasukkan dan juga penerangan bagi kelewatan dalam membuat permohonan dan sama ada defendan mempunyai pembelaan bermerit

seperti yang dikemukakan dalam afidavit sokongan (lihat perenggan 14). A

(2) Peguam-peguam plaintif sewajarnya menyampaikan kertas-kertas kausa kepada peguam-peguam defendan terdahulu kerana plaintif mengetahui bahawa mereka mewakili defendan. Peguam-peguam plaintif sepatutnya memberitahu peguam-peguam defendan sama ada mereka mempunyai B arahan untuk menerima proses penyampaian. Setelah diketahui siapa peguam yang bertindak bagi pihak lawan, adalah menjadi hal perkara keadilan untuk menghukum mereka. Atas alasan ini sahaja, PIK sepatutnya diketepikan. Atas rasional yang sama, PIK sepatutnya disampaikan kepada peguam-peguam defendan terdahulu (lihat C perenggan 18 & 22).

(3) Kelewatan enam hari dalam memfailkan permohonan pada 12 September 2013 untuk mengenepikan PIK adalah sengaja kerana defendan hanya mengetahui mengenai PIK pada 15 Ogos 2013. Melihat pada dapatan bahawa plaintif telah mengetahui bahawa defendan D diwakili oleh peguam-peguamnya yang terdahulu namun peguam-peguam plaintif memilih untuk menyampaikan PIK kepada defendan secara peribadi, kelewatan bukanlah salah defendan sepenuhnya (lihat perenggan 22).

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(4) Walaupun s 12 Akta Tafsiran 1948 dan 1967 mengandungi anggapan penyampaian sempurna (melalui pos berdaftar pra-bayar), s 12 juga menyatakan bahawa 'hingga sebaliknya dibuktikan'. Ini bermaksud bahawa anggapan tersebut boleh disangkal. Defendan telah membuat siasatan dengan Pos Malaysia dan laman web mereka menunjukkan F bahawa surat plaintif belum disampaikan kepada defendan. Defendan perlu membuktikan ketidaksampaian kepadanya seperti yang diperuntukkan oleh s 12. Surat yang mengandungi PIK tersebut masih berada di pejabat Pos Malaysia (lihat perenggan 26).

(5) Oleh kerana penyampaian dicabar dan terdapat bukti bahawa pejabat G pos belum menghantar surat tersebut kepada perayu, tiada penyampaian sempurna PIK kepada defendan. Defendan juga tidak menerima PIK seperti yang dinyatakan dalam A 42 k 13 KKM. Permohonan defendan, dengan itu, adalah dalam tempoh masa (lihat perenggan 27).

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(6) Walaupun penyampaian saman dan penyata tuntutan sempurna di bawah undang-undang, satu penghakiman ingkar kehadiran boleh diketepikan sekiranya mahkamah berpuas hati bahawa terdapat pembelaan bermerit. Kesemuanya jelas boleh dibicarakan yang mana akan memerlukan keterangan dikemukan semasa perbicaraan (lihat I perenggan 30 & 40).

(7) Ketidakpatuhan KKM tidak menyebabkan kegagalan keadilan atau prejudis yang boleh diremedikan oleh sama ada pindaan atau perintah terhadap kos yang sesuai atau kedua-duanya (lihat perenggan 41–42).]

Notes

For cases on judgment in default, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 7909–7913.

For cases on post, service by, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 7807–7814.

For cases on setting aside, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5183–5250.

Cases referred to

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413, SC (refd)

Anthony Goh Khiok Loong (suing by his father and next friend, Goh Kok Hua) v Chan Yam Heng & Anor [2007] 1 MLJ 140; [2006] 7 CLJ 309, HC (refd)

Artisan Fokus Sdn Bhd v Dato' Sivananthan Shanmugam and another [2013] 1 LNS 225, HC (refd)

Asia Commercial Finance (M) Berhad v Bank Bumiputra Malaysia Berhad & Ors [1988] 1 MLJ 33 (refd)

B Dialdas & Co (Pte) Ltd v Sin Sin & Co & Ors [1984] 2 MLJ 223, HC (refd)

Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat [1979] 1 MLJ 23; [1978] 1 LNS 15, FC (refd)

Burmah Oil Co Ltd v Bank of England [1979] 1 WLR 473, CA (refd)

Cedar Trading Sdn Bhd v Dong Ah Construction Industrial Co Ltd (Standard Chartered Bank, Garnishee) [1999] 5 MLJ 65, HC (refd)

Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd [2003] 3 MLJ 321, CA (refd)

CIMB Bank Bhd v Comsa Layer Farms Sdn Bhd & Anor [2011] 2 MLJ 118, HC (refd)

Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors [2002] 7 MLJ 430, HC (refd)

Evans v Bartlam [1937] AC 473, HL (refd)

Fira Development Sdn Bhd v Goidwin Sdn Bhd [1989] 1 MLJ 40; [1989] 1 CLJ 32 (Rep); [1989] 1 CLJ 1, SC (refd)

Hasbullah Chan & Associates Architect v Rahika Development Sdn Bhd [2000] 4 MLJ 289; [2000] 7 CLJ 109, HC (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312, SC (refd)

Kandaraju a/l Frapatan v MBF Finance Bhd [2006] 7 MLJ 91; [2006] 7 CLJ 27, HC (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223; [1997] 1 CLJ 396, CA (refd)

Kini Abadi Sdn Bhd v Tamabina Sdn Bhd [2013] 1 LNS 663, HC (refd)

Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 MLJ 209; [1998] 3 CLJ 335, CA (refd)

MBF Finance Bhd v Tiong Kieng Seng [2001 MLJU 405; [2001] 4 CLJ 38, HC (refd)

Maharin Nisha bte Hassan Mohamed v Panir Selvam a/l Chellamuthu & Anor [2005] 6 MLJ 572, HC (refd)
Malayan Banking Berhad v The North Borneo Corporation Berhad [2010] MLJU 1594, HC (refd)
Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors [1988] 3 MLJ 165; [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762, HC (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, CA (refd)
Mokhtar bin Amin v Mohamed Moktar bin Omar [2001] 4 MLJ 329, CA (refd)
Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (Appointed Receivers and Managers) [2003] 4 MLJ 647; [2003]4 CLJ 533, CA (refd)
PL Construction Sdn Bhd v Abdullah bin Said [1989] 1 MLJ 60; [1988] 2 CLJ 808, HC (refd)
Pengkalen Concrete Sdn Bhd v Chow Mooi (Guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67; [2003] 6 CLJ 326, HC (refd)
Pengurusan Danaharta Nasional Bhd v The Ayer Molek Rubber Company Bhd (Suit N D-22-1165-2009) (unreported), HC (refd)
Revici v Prentice Hall Incorporated and Others [1969] 1 WLR 157 (refd)
Samuel Pakianathan a/l Jabamanickam, ex p Perwira Habib Bank (M) Bhd, Re [1997] 5 MLJ 737, HC (refd)
Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348; [1985] 2 CLJ 97; [1985] CLJ (Rep) 760, HC (refd)
Seok Mee Seong v Abdul Wahab bin Abdul Rahman [1989] 1 MLJ 193; [1988] 2 CLJ 694; [1988] 2 CLJ (Rep) 415, HC (refd)
Siva Marathia & Another v Poh Giak King & another [2013] 1 LNS 802, HC (refd)
Sri Minal Construction Sdn Bhd v Mobil Oil Malaysia Sdn Bhd [2006] 1 MLJ 746; [2005] 4 CLJ 767, CA (refd)
Tan Kim Hock v Huang Yann Chong [1999] 1 MLJ 343, CA (refd)
United Oriental Assurance Sdn Bhd v Ng King See [1987] 2 MLJ 264; [1986] 1 LNS 87 (refd)
Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112; [2008] 4 CLJ 175, CA (refd)

Legislation referred to

Advocates Ordinance Sarawak 1953 (Cap 110)
Advocate (Practice and Etiquette) Rules 1988 r 56
Interpretation Acts 1948 and 1967 s 12
Legal Profession (Practice and Etiquette) Rules 1978 r 56
Rules of Court 2012 O 1A, O 2 r 3, O 13 r 8, O 42 r 13, O 62 r 6

Bong Siak Peng (Bong Siak Peng Advocates) for the appellant.
Theresa Udam (Sio & Ting Advocates) for the respondent.

Mairin Idang JC:

INTRODUCTION

[1] For convenience and ease of reference in this appeal the appellant and the respondent shall be referred to as the defendant and the plaintiff respectively. This appeal arises from the decision of the learned session court judge ('the SCJ') in dismissing the defendant's application to set aside the judgment in default of appearance ('the JID') entered against her. On the 26 March 2014 I ordered both counsel to submit further on O 42 r 13 of the Rules of Court 2012 ('the ROC') in particular the interpretation of 'within 30 days of *receipt* of the judgment or order by him' (Emphasis added.) I then reserve my judgment to the 16 April 2014.

THE FACTS

[2] I take the following summary of the facts from the ruling of the learned SCJ delivered on the 23 December 2013 ('the ruling'). The plaintiff had on 30 July 2013 entered a judgment in default of appearance against the defendant. The plaintiff had then served the JID on the respondent by way of prepaid registered post on the 6 August 2013 which the respondent had denied receiving. On 12 September 2013 the defendant filed her application under O 42 r 13 of the ROC to set aside the JID ('the application'). The learned SCJ after hearing the parties had dismissed the defendant's application on the basis that the application was out of time by six days from 6 September 2013. It is also the finding of the learned SCJ that the defendant had not explained in her affidavit on the delay in making her application to set aside and since there was no application for extension of time the learned SCJ could not consider the merits of the defendant's application. The learned SCJ did not really address the grounds of the defendant's application. In coming to her ruling the learned SCJ had relied on the cases of *Kandaraju a/l Frapatan v MBF Finance Bhd* [2006] 7 MLJ 91; [2006] 7 CLJ 27 and *Maharin Nisha bte Hassan Mohamed v Panir Selvam* [2005] 6 MLJ 572.

THE DEFENDANT'S APPLICATION

[3] The defendant's application is for (a) an order that the judgment in default of appearance dated the 30 July 2013 be set aside (b) the defendant be given leave to file and serve her defence within 14 days from the date of the order granted and (c) costs of this application be costs in the cause. The defendant's application was grounded on the defence on the merits and that the judgment should be an interlocutory judgment since the plaintiff's claims consisted of unliquidated damage. There were also other grounds stated in the defendant's affidavit in support.

THE LAW

[4] On the 13 July 2013 the writ and statement of claim was served on the defendant personally. Having then failed to enter an appearance a judgment in default of appearance under O 13 of the ROC was entered against the defendant. The JID was then served on the defendant by prepaid registered post on the 6 August 2013.

[5] Such a judgment can be set aside under O 42 r 13 of the ROC which provides: 'Save as otherwise provided in these rules, where provisions are made in these rules for setting aside or varying of any order or judgment, a party intending to set aside or vary such order or judgment shall make an application to the court and serve it on the party who has obtained the order or judgment *within thirty days after the receipt of the order or judgment by him*. (Emphasis added.)

[6] As the JID was served on the defendant by way of prepaid registered letter the following laws are relevant and applicable.

(a) Order 62 r 6 of the ROC 2012 :

> (1) The service of any document, not being a document which in accordance with these Rules is required to be served personally, may be effected:
>
> (b) by prepaid registered post

(b) Section 12 the Interpretation Acts 1948 and 1967 (Act 388) provides:

> 12 Service by post.
>
> Where a written law authorizes or requires a document to be served by post, then, *until the contrary is proved*, service:
>
> (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
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> *(b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post. (Emphasis added.)*

THE ARGUMENTS

[7] At the outset the parties herein are presently represented by Messrs Bong Siak Peng Advocates for the defendant (the defendant lawyers) and Messrs Sio & Ting Advocates for the plaintiff (the plaintiff lawyers) respectively. The defendant's former lawyer was Messrs Sia Alvin Wong & Partners Advocates (defendant former lawyers).

A THE DEFENDANT'S ASSERTIONS

[8] In summary learned counsel for the defendant had argued that the writ including the statement of claim had not been properly served on the defendant. These documents should have been served on the defendant's B former lawyers. The defendant asserts that the plaintiff lawyers had known of the dispute between the parties much earlier before the filing of the summons on the 2 July 2013. There were letters passing between the defendant former lawyers and the plaintiff lawyers from 14 December 2012 up to 7 August 2013. C As such the plaintiff lawyers knew or ought to know that the defendant was represented by the defendant previous lawyers therefore all cause papers should have been served on the defendant former lawyers. The plaintiff lawyers had also failed to comply with the 48 hour notice required under the Advocates Ordinance Sarawak (Sarawak Cap 110) r 56 of the Advocates (Practice and D Etiquette) Rules 1998 before entering the JID.

[9] As there was no proper of service of the writ and statement of claim on the defendant the judgment entered was an irregular judgment and ought to be set aside *ex debitio*.

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[10] The defendant also asserts that the JID should have been served on the defendant former lawyers for the same reason that the plaintiff knew the defendant former lawyers were acting for the defendant. The plaintiff had instead chose to serve the JID by prepaid registered letter which had not been F received by the defendant. The defendant argued that the posting of the JID by prepaid registered post was not conclusive on the ground that there was proof that the said letter containing the JID was still in the process of being delivered by the Pos Malaysia. The defendant asserts there must be actual service of the JID on her to constitute receipt therefore time for setting aside the JID had not G commenced. The defendant also argued that she had explained the delay on the application to set aside in her affidavit and that there is a defence on the merits. The defendant also relied on O 1A of the ROC. Therefore the application to set aside the JID should have been considered and allowed by the learned SCJ.

H **[11]** The defendant had relied on the following case in support of her application *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348, *Re Samuel Pakianathan a/l Jabamanickam, ex p Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737, *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23, *Fira Development Sdn Bhd v Goldwin Sdn Bhd* I [1989] 1 MLJ 40, *Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329, *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321, *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385, *Cedar Trading Sdn Bhd v Dong Construction Industrial Co Ltd (standard chartered Bank, Garnishee)* [1999] 5 MLJ 65, *CIMB Bank*

Bhd v Comsa Layer Farms Sdn bhd & Anor [2011] 2 MLJ 118, *Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashhbhai Nagjibhai & Ors* [2002] 7 MLJ 430, *Malayan Banking Berhad v The North Borneo Corporation Berhad* [2010] MLJU 1594, *MBF Finance Berhad v Tiong Kieng Seng* [2001] MLJU 405.

THE PLAINTIFF'S ASSERTIONS

[12] In summary the plaintiff argues that the writ and statement of claim was served on the defendant personally therefore the judgment in default of appearance entered against the defendant was a regular judgment. The service of the JID by prepaid registered post was also valid since there was no requirement on acknowledgement of service by the defendant. The defendant's application to set aside the JID filed therein was six days out of time. The service of the said application on the plaintiff was also 20 days after the filing of the application. There was no explanation on the delay in filing the said application to set aside. There was also no application for extension of time to file the application. There was therefore no requirement for the court to consider whether there is a defence on the merits. Therefore the defendant's application was properly dismissed by the learned SCJ.

[13] The plaintiff had relied on the following cases *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; [1997] 1 CLJ 396, *Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 MLJ 209; [1998] 3 CLJ 335, *Anthony Goh Khiok Loong (suing by his father and next friend, Goh Kok Hua) v Chan Yam Heng & Anor* [2007] 1 MLJ 140; [2006] 7 CLJ 309, *Revici v Prentice Hall Incorporated and Others* [1969] 1 WLR 157, *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 3 MLJ 112; [2008] 4 CLJ 175, *Siva Marathia & Another v Poh Giak King & another* [2013] 1 LNS 802, *Burmah Oil Co Ltd v Bank of England* [1979] 1 WLR 473, *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (Appointed Receivers and Managers)* [2003] 4 MLJ 647; [2003]4 CLJ 533, *Kandaraju a/l Frapatan v MBF Finance Bhd* [2006] 7 MLJ 91; [2006] 7 CLJ 27, *Pengkalen Concrete Sdn Bhd v Chow Mooi (Guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67; [2003] 6 CLJ 326, *MBF Finance Bhd v Tiong Kieng Seng* [2001 MLJU 405; [2001] 4 CLJ 38, *Maharin Nisha bte Hassan Mohamed v Panir Selvam a/l Chellamuthu & Anor* [2005] 6 MLJ 572, *Anthony Goh Khiok Loong (suing by his father and next friend, Goh Kok Hua) v Chan Yam Heng & Anor* [2006] 7 CLJ 309, *Pengurusan Danaharta Nasional Bhd v The Ayer Molek Rubber Company Bhd* (Suit N D-22–1165 of 2009), *Kini Abadi Sdn Bhd v Tamabina Sdn Bhd* [2013] 1 LNS 663, *Artisan Fokus Sdn Bhd v Dato' Sivananthan Shanmugam and another* [2013] 1 LNS 225, *CIMB Bank Bhd v Comsa Layer Farms Sdn Bhd & Anor* [2011] 2 MLJ 118, *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413.

A ANALYSIS OF THIS APPEAL

[14] I am reminded that in the exercise of my discretion to set aside the JID I am entitled to look at all circumstances including the circumstances under which the JID was allowed to be entered as well as the explanation for the delay B in making the application and whether the defendant has defence on the merits as shown in the affidavit in support *Bank Bumiputra Malaysia Bhd v Majlis Amanah Rakyat* [1979] 1 MLJ 23. I am also reminded that a defence on the merits means a defence which discloses an arguable and triable issue *PL Construction Sdn Bhd v Abdullah bin Said* [1988] 1 MLJ 60; [1988] 2 CLJ C 808. However it is not sufficient for the defendant to show a prima facie or an arguable defence; the defence must have a real prospect of success *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking* [1994] 1 MLJ 312 (SC).

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[15] I have read the affidavits filed by the defendant and the plaintiff including their respective submissions and authorities.

[16] The JID was entered in pursuance of O 13 r 8 of the ROC and the E application to set aside must be made under O 42 r 13 of the ROC and to do so within 30 days after receipt of the said order or judgment *Maharin Nisha bte Hassan Mohamed v Panir Selvam a/l Chellamuthu & Anor* [2005] 6 MLJ 572. In this appeal the defendant was a mere six days out of time in filing and 20 days late in serving the application on the plaintiff.

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Service of the writ and statement of claim

[17] Now the defendant says that the JID was irregularly obtained as the cause papers should have been served on the defendant former lawyers. The G respondent lawyers ought to have served the cause papers on the defendant former lawyers as the plaintiff had known that they were acting for the defendant. In fact it is the defendant's assertion that she did not sign service of the writ and told the process server to serve on her previous lawyers (see para 6 of p 5 record of appeal). There were correspondence between the defendant H former lawyers and the plaintiff lawyers pertaining to the tenancy which is the subject matter of the present suit (see pp 18 and 23–28 record of appeal (ROA)).

[18] These letters were all attached to the defendant's affidavit in support I dated 12 September 2013 (encl 9) and they bore the letterhead of the respective lawyers. I find that they spoke volume of this tenancy agreement and the position of the defendant former lawyers. Those letters are contemporaneous documents. Those letters were issued by the respective lawyers acting for their respective clients. I do not believe that the plaintiff lawyers can deny this. Thus

I would have expected that the plaintiff lawyers should have communicated with the defendant lawyers on whether they have instruction to accept service of process. Lawyers are expected to do this. I think it is always done. I do that when I was in practice. It is a matter of justice. After all lawyers are all gentlemen and ladies of the Bar. Surely in not communicating with the defendant lawyers could invite all sorts of speculation as to the reasons. I hope there was no intention to 'pull a fast one' so to speak but His Lordship Gopal Sri Ram JCA (as he then was) had succinctly said 'The plaintiff no doubt did what he did in order to steal a march on the defendant' (see *Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329). The Court of Appeal in that case had upheld the decision of the High Court in setting aside the judgment in default on the basis that the entry of the judgment in default amounted to an abuse of process.

[19] I may also add that here in Sarawak there is a r 56 of the Advocates (Practice and Etiquette) Rules 1988 wherein a 48 hour notice must be given to the other side before a judgment in default is entered. Rule 56 speaks of where the name of the advocate or his firm appears on the court record *or the fact of representation is known to the other side*. Having read the letters passing between the plaintiff lawyers and the defendant former lawyers the plaintiff lawyers surely knew that the defendant former lawyers were representing the defendant. To me this r 56 is inserted therein is for a purpose and is meant to be compiled with (Emphasis added.)

[20] I take notice that on this requirement of 48 hour notice there are two divergence views on this. In *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33 (HC) it was held that the Practice and Etiquette Rules only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor and do not regulate the procedure of legal proceedings in the High Court. In *Hasbullah Chan & Associates Architect v Rahika Development Sdn Bhd* [2000] 4 MLJ 289; [2000] 7 CLJ 109 the High Court held that the breach of the Practice and Etiquette Rules 1978, r 56 must be considered in an application to set aside a JID as it has the force of law. The Court of Appeal had now settled these divergent views in the case of *Sri Minal Construction Sdn Bhd v Mobil Oil Malaysia Sdn Bhd* [2006] 1 MLJ 746; [2005] 4 CLJ 767 wherein they had considered both principles and found in favour of the principle in *Asia Commercial Finance (M) Bhd* that r 56 does not regulate the procedure of legal proceedings in the high court. Be that as it may I am of the view that once you knew who the other lawyer acting for your client's opponent it is a matter of justice that you served on them. There can never be justice when there is abuse of process as I have found here. In *Mokhtar bin Amin* this is what the Court of Appeal had to say at para H p 334 'now, it is true that the rules of court countenance the service of process upon a litigant in person. But it does not follow that in every case where

there is due observance of a rule of court, no abuse of process may ensure. A rule of court, like any other provision, may be the subject of abuse. And it is the function and duty of the courts to be ever vigilant against this'. On this ground alone I do hereby exercise my discretion that the JID should be set aside.

Application to set aside judgment in default

[21] Now O 42 r 13 of the ROC 2012 provides that a party intending to set aside a judgment shall make an application to the court and serve the same on the other party within 30 days after the *receipt* of the said judgment (Emphasis added.)

[22] The plaintiff had served the JID on the defendant by prepaid registered post. On the same rationale the JID should have been served on the defendant former lawyers. The defendant would definitely apply to set aside the JID. There was explanation of the delay in filing the application. The defendant said that she had not received the JID. She was only informed by her former lawyers when they informed her that the plaintiff lawyers had informed them that the JID had been entered against her and the same was sent to the defendant by post on 6 August 2013. The delay of six days in filing her application on the 12 September 2013 to set aside the JID was not intentional as she only came to know of the JID on the 15 August 2013 (see para 13 p 6 record of appeal). In view of my finding that the plaintiff had known that the defendant was represented by her former lawyers yet the plaintiff lawyers chose to serve the defendant the JID personally I therefore find that the delay was not entirely the defendant's fault.

[23] I do not consider that the appellant had intentionally disregarded compliance of the rules of court in not filing her application within time. The defendant had in fact reacted quickly when informed of the JID. She had immediately retain the service of her present lawyer to file the application to set aside the JID. I have stated the appellant had no opportunity to file the application within time. She had no knowledge that the JID was posted to her address. The defendant had yet to receive the plaintiff's letter containing the JID from the post office as at the date of filing the application. The appellant had checked with the Pos Malaysia website which revealed that the status of the said registered post in the system as of 13 August 2013 as being 'still attempting to deliver' (see p 67 record of appeal). It is for this reason that I have ordered parties to address me on 'receipt' as appearing in O 42 r 13 namely its applicability on service by prepaid registered post.

[24] In the instant case the plaintiff lawyers had served the JID on the defendant by prepaid registered post which was under O 62 r 6 of the ROC 2012 being one of the modes of service provided therein. As to service by post

s 12 of the Interpretation Acts 1948 and 1967 (Act 388) is relevant. Now in s 12 it is stated *until the contrary is proved* service would be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the documents and *would be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of post*: *Tan Kim Hock v Huang Yann Chong* [1999] 1 MLJ 343 (CA) (Emphasis added.)

[25] Now counsel for the defendant had brought to my attention that although s 12 has that presumption of good service (by prepaid registered post) — '*would be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of post*' but then again s 12 also states '*until the contrary is proved*'. This would mean that the presumption is rebuttable. In *MBF Finance Berhad v Tiong Kieng Seng* [2001] MLJU 405 at p 12 Datuk Clement Skinner J (as he then was) said 'I however agree with the submission of counsel for the respondent that the *written receipt given under the Post Office Rules constitute prima facie and not conclusive proof of service — it would not preclude or prevent a defendant from trying to show that there had been some irregularity in service because the presumption of service that arises under the Interpretation Act is a rebuttable one* and, as often happens, where a summons is served by post and is not returned unserved, the court acts on the plaintiff's proof of posting and any documents relied on in support thereof at their face value when they are exhibited to an affidavit of service and will not be aware of any alleged irregularities or defects in service until challenged' (Emphasis added.) I wholly agree with His Lordship on his interpretation of s 12 of the Interpretations Acts 1948 and 1967 (Emphasis added.)

[26] In the instant case the postal service was challenged. The defendant had then made an investigation with Pos Malaysia and their website had revealed that the plaintiff's letter had yet to be delivered to the defendant. Surely the defendant had proven non-delivery to her as required by s 12. The letter containing the JID was still at the office of Pos Malaysia. Does the presumption of the good service apply? I am mindful that the plaintiff has cited several cases on the postal serving that once there is compliance with the rules on posting the service is good. I agree that there is no requirement for acknowledgement by the recipient unlike where service was done under AR registered post. However in those cases cited the posting was not challenged by the production of a document that had challenged the very presumption of a good service by posting which was done here by the defendant.

[27] The defendant had produced a print out of tracking shipments from the Pos Malaysia website which is at p 67 of the record of appeal. On reading the details result for registered No RD252007225MY (p 67 record of appeal) which is enclosed in the plaintiff lawyers' letter, it is stated there '06–August

2013 attempt to deliver and on 13–August 2013 attempt to deliver'. As of 13 August 2014 the letter containing the JID was still at Pos Office. Now I ask myself what actually is meant by attempt to deliver. Does this mean that the Pos Malaysia postmen had gone to the address of the defendant and had attempted to deliver the registered post but that the defendant either had refused to accept or was not around at the address when the attempt of service was made? Now the *Concise Oxford Dictionary* has this to say on attempt: 'seek to achieve or complete (a task or action)' It is clear that with the kind of report in the website Pos Malaysia had yet to complete the task of delivery of the letter addressed to the appellant. Since the posting was challenged and there is proof that the Pos office had yet to deliver the letter to the appellant I hold that there was no proper service of the JID on the defendant. The defendant has not received the JID as stated in O 42 r 13 of the ROC. The defendant's application is therefore well within time. On this ground I would allow the appeal.

[28] If I am wrong to hold otherwise that the JID has been properly served on the defendant then I must consider whether there is merits in the defence of the defendant as deposed in her affidavit in support of her application to set aside the JID

Principle of law in setting aside judgment in default

[29] There are plethora of cases on this. The principle on the setting aside of a judgment in default has been clearly enunciated in the Court of Appeal case of *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112; [2008] 4 CLJ 175 in which the court held as follows:

> It is trite that when considering an application to set aside a judgment in default, the first task is to ascertain whether it is a regular or irregular judgment. If it is an irregular judgment, then the default judgment ought to be set aside ex debitio justitae. If it is regularly obtained, then the principle expounded in *Evans v Bartlam* [1937] AC 473 applies — see the judgment of the Federal Court in *Hasil Bumi Perumahan Sdn Bhd & 5 Ors v United Malayan Banking Berhad* [1994] 1 MLJ 312; [1994] 1 CLJ 328. This requires the defendant to show that he has a defence on merits. Delay in making such application is a factor to be considered by the court in deciding whether to grant or refuse the application — see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241.

[30] There are also authorities to show that even though service of the summons and statement of claims is good in law, a judgment in default of appearance may be set aside if the court is satisfied that there is a defence on merits.

[31] In *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348; [1985] 2 CLJ 97; [1985] CLJ (Rep) 760 Edgar Joseph Jr had said:

> What I consider however to be crucial in application of this sort is whether there was evidence before the court disclosing a prima facie defence to the plaintiff's claim for possession or, in other words, a defence on the merits. For this purpose, the applicant needs only disclose an arguable or triable issue or, in other words, an arguable case which ought to go for trial.

[32] In *Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165; [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762 Zakaria Yatim J, had also held that:

> The important consideration in an application to set aside judgment in default is whether there is a defence on the merits. The question of delay is a secondary matter.

[33] In another case, *Seok Mee Seong v Abdul Wahab Abdul Rahman* [1989] 1 MLJ 193; [1988] 2 CLJ 694; [1988] 2 CLJ (Rep) 415 Mustapha Hussain J at p 195 (MLJ); p 696 (CLJ) had this to say:

> In an application to set aside a judgment in default, the explanation as to why the defendant or his counsel was absent is relevant but not the deciding factor. What is important or crucial is whether there is a defence on the merits. The draft defence enclosed with the application discloses triable issues within the meaning of Evans v Bartlam. The learned Magistrate should have allowed the application to set aside and leave to the applicant to defend the action subject to the applicant paying costs.

It is now trite law that where applications are made to set aside default but regular judgments, the rule, which has sometimes been described as 'an almost inflexible rule', is that there ought to be affidavits stating facts showing a defence on the merits. In *Evans v Bartlam* [1937] AC 473 Lord Atkin in his judgment at p 480 said:

> ... that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence ...

[34] In *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; [1978] 1 LNS 15 Raja Azlan Shah CJ (Malaya) (now His Majesty) said:

> ... It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits ...

And to show a defence on the merits, a defendant need only disclose an arguable or triable issue (*B Dialdas & Co (Pte) Ltd v Sin Sin & Co & Ors* [1984] 2 MLJ 223).

The courts are given the wide discretion to set aside default judgment. Thus, there cannot be any rigid rule governing the setting aside of default judgment. I am fortified in this proposition by a passage appearing in *Evans v Bartlam*

where Lord Atkin said:

> If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.
>
> The question for this Court to consider is whether the affidavits of the appellants as set out above disclose a defence on the merits or an arguable or triable issue.

[35] The question of delay was considerd in *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40; [1989] 1 CLJ 32 (Rep); [1989] 1 CLJ 1, the plaintiffs had built houses for the defendant at their request. The plaintiffs claimed certain sum was due and owing and obtained judgment in default of appearance. The defendant thereafter made an application seeking leave to enter appearance and to set aside the judgment. The learned trial judge dismissed the application on the ground that the defendant was not able to account for the delay in making the application and the reason for not entering appearance. Further, the learned judge stated that it was not necessary for him to consider the merits of the case. The defendant appealed. The Supreme Court stated:

> (i) Where an application is made for setting aside a judgment in default the learned *judge would have to consider the merits of the case*.
>
> (ii) *Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court, 1980, the court has an absolute discretion to set aside the judgment on terms and allow the case to be heard on the merits.*
>
> (iii) As to delay there is no rigid rule that an applicant must satisfy the court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously the reasons, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion.
>
> (iv) The application should clearly be made promptly and within a reasonable time. *But the court will in a fit case disregard lapse of time* (Emphasis added.)

[36] In *United Oriental Assurance Sdn Bhd v Ng King See* [1987] 2 MLJ 264; [1986] 1 LNS 87, the court allowed a judgment in default of appearance to be set aside even though the defendant filed an application to set aside the default judgment after three years. Yusof Mohamed J observed:

> The rule is that such application must be made promptly and within a reasonable time. But the rule also allows the court in a proper case to disregard the lapse of time.
>
> In the present case, the claim is for reimbursement of money already paid. Although the delay was necessarily long, the defendant was given reasonable grounds challenging the substituted service of the writ. There are also points of law raised

which are of public interest whether such manipulation by the insurers would bind the defendant. The plaintiffs are not in any way prejudiced by the delay.

Consideration on the merits of the defence

[37] The learned SCJ had not adjudicated on the merits of the appellant's defence. In her ruling she said the appellant had not given reasons on the delay in filing the application which was fatal. I have ruled that the delay was explained (see para (17)–(20) above). This is a fit case for me to disregard lapse of time.

[38] The authorities I have cited above made it abundance clear that where there was delay in filing an application to set aside the JID then the court has to look at whether the defendant's defence has merits.

[39] I have read the affidavit (see p 4 record of appeal) filed by the defndant in support of this application. I have also gone through the draft defence exhibited in the affidavit (see p 19 record of appeal). It is clear to me that the subject matter is the tenancy agreement dated 1 June 2011 and the disputes are:

(a) cl 6.1, plaintiff had failed to comply on giving three months notice in writing on intention to opt for option to renew tenancy before expiration of the term of tenancy;

(b) cl 6.2 , the defendant had given the respondent a written notice to terminate the tenancy upon expiration of the tenancy;

(c) there was the respondent allegation that the defendant letter dated 20 August 2012 had stated tenancy for a two years period from 1 December 2010 to 30 November 2012 when the tenure of the tenancy is for 1 1/2 years from 1 June 2011 to 30 November 2012.

(d) cl 2.4 does not allow structural alterations or additions to the premises without the prior consent of the defendant; and

(e) cl 2.5 renovations had infringed the by laws or regulations as such the same was illegal.

[40] The above are clearly triable which would require evidence to be led at the trial.

Compliance with the rules of court

[41] No doubt the plaintiff will say that the defendant had not complied with the rules of court on the procedure on filing of the application to set aside the JID. I wholly agree with that but here in the instant case I am of the opinion the plaintiff cannot say that he was not blameworthy. I think the plaintiff must

take his share of the blame. I have said in my decision here that the plaintiff had knowledge that the defendant was represented by a firm of solicitors but chose to serve the defendant personally. Having had this knowledge yet chose another mode of service is to me an abuse of process. I have also found in my analysis of the affidavits that the defendant have merits in her defence that ought to be litigated. The appellant should not be shut out. I am here to exercise my discretion where I see injustice being done and for whom I should exercise my discretion. Let me also say that the rules of court do not look kindly to abuses of process as well as non-compliance. The present *Malaysian Civil Procedure 2013* has a lot to say about justice. Let me just quote what YAA Tun Ariffin Zakaria had said in para 4 of his PREFACE: 'It is apt to note that while the ROC 2012 aims to promote an efficient delivery of justice, regard for substantial justice has also been enhanced. Order 1A mandates that in administering the ROC 2012, the court shall have regard to the 'overriding interest of justice' and not only to the technical non-compliance with the ROC 2012. Order 2 r 3 further provided that any preliminary objection by any party only on the ground of non-compliance of any provision of the ROC 2012 shall not be allowed unless the court is of the opinion that such non-compliance has 'occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or appropriate order of costs or both'. This development should ensure that cases are decided on their respective merits rather than by way of adhering to rigid technicalities. The rules make it clear enough that justice comes first and that technicalities will not prevail'.

[42] Therein lies my decision. I do not think that the non-compliance had 'occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or appropriate order of costs or both'. I like to think that YAA Tun Arrifin has this present case or the like of others in mind when he penned his judicious mind on para 4 which I have just quoted verbartim.

CONCLUSION

[43] For reasons that I have stated above I allow this appeal with costs of RM5,000 to the plaintiff. The plaintiff should be compensated with cost for the delay in filing the application. I now order that the defendant is to file her defence within 14 days from the date of this order.

Appeal allowed with costs.

Reported by Kanesh Sundrum